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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1309

MARYLAND PUBLIC INTEREST RESEARCH GROUP,
Petitioner,

v.

WILSON H. ELKINS, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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April 14, 1978

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By confusing this Court's decisions involving government funding with the Court's controlling unconstitutional-condition cases, respondents' opposition to the petition for certiorari has highlighted the precise question that this Court should grant certiorari to resolve. It is undisputed that the Regents have placed an absolute condition on MaryPIRG's receipt of student activity funds: if MaryPIRG utilizes its staff attorneys to litigate, its sole source of funding will be terminated. Moreover, because MaryPIRG is financially unable to litigate without relying on its staff attorneys, as a practical matter, MaryPIRG is forced to relinquish its right to litigate in order to obtain its share of funds. This is a classic unconstitutional condition, and the District Court set it aside as such, relying on the established line of authorities traced in *Perry v. Sindermann*, 408 U.S. 593 (1972).

Nevertheless, respondents have attempted to frame the issue as one involving nothing more than a decision not to *finance* a particular activity, citing this Court's recent decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). However, those cases are inapposite because funding is not the issue here.

Unlike the situation in *Maher*, where a state's refusal to finance elective abortions was upheld after minimal scrutiny under the "rational relationship" test, all of the funds necessary for MaryPIRG to litigate have already been appropriated. The question of whether MaryPIRG's staff attorneys, whose salaries are already being paid, may enter court or not is of absolutely no financial consequence to respondents, to any student, or to any other student organization, since MaryPIRG's funding level will in no way vary as a result of its ability to engage in litigation. Moreover, because the Regents have affected First Amendment rights, their actions must be subjected to strict scrutiny rather than the minimal scrutiny standard applied in *Maher*.

In an effort to bring this case within the ambit of *Abood*, respondents' brief also suggests that the restriction is necessary to protect students from being forced to support public interest activities with which they might disagree. However, this rationale, which has only been asserted by respondents' counsel – never by the Regents themselves – is wholly belied by the fact that no restriction whatsoever has been placed on MaryPIRG's ability to lobby, to testify concerning legislation, or to engage in even the most partisan types of political activity. Only access to the courts has been barred, and it has been barred without any offered justification.

This case does *not* concern how the balance between competing interests should properly be struck. There is no balancing to be done since the Regents have refused to offer any justifications for their restriction. In light of this refusal, as the District Court correctly found, the litigation restriction is an invalid unconstitutional condition. No genuine "funding" issue is even present. Nevertheless, the very fact that respondents and a panel of the Fourth Circuit viewed funding as the predominant issue strongly suggests the need for this Court to clarify the parameters of the unconstitutional condition doctrine in light of the recent decisions now relied upon by respondents.

For the reasons stated herein and in the petition, this Court should grant certiorari.

Respectfully submitted,

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